

Tong Chun Sing & Sons Sdn Bhd v Ng Geok Hwa

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
WA-24NCVC-203-02 OF 2017
FAIZAH JAMALUDIN JC
3 MAY 2017

Land Law — Caveat — Removal — Defendant entered caveat on land owned by plaintiff — Plaintiff applied for removal of caveat — Whether defendant had registrable and/or caveatable interest on land — National Land Code s 327

The plaintiff and the defendant had entered into a sale and purchase agreement ('the 2013 SPA') of a land located in Bukit Nanas, Kuala Lumpur. A dispute arose between the parties in relation of the 2013 SPA and consequently, the defendant entered caveat on the land. The defendant then commenced an action against the plaintiff ('the suit') and subsequently they entered into consent order in relation to the said action. On 20 December 2016, the plaintiff entered into a sale and purchase agreement ('the SPA') with a third-party whereby the plaintiff agreed to sell and the buyer agreed to buy the land for a purchase price of RM29m. The plaintiff's solicitors had notified the defendant of the SPA ('the notice') and requested that the defendant withdraw the caveat in accordance with cl 2(g) of the consent order but the defendant refused to withdraw the caveat. The plaintiff then filed the present application ('encl 1') under s 327 of the National Land Code for the removal of the caveat entered by the defendant on the land. The plaintiff submitted that the caveat ought to be removed because the defendant did not have any registrable interest and/or caveatable interest in the land; and there was no serious question meriting trial. As opposed to the plaintiff's submission, the defendant contended that the SPA did not conform to the terms of the consent order and that the consent order accorded him the right to maintain the caveat on the land. The defendant further submitted that he had a caveatable interest on the land, which interest originated from the 2013 SPA.

Held, allowing the order in terms of encl 1 with costs of RM15,000 subject to allocator:

- (1) The law on removal of private caveat is well established. The plaintiff as the registered owner of the land could rely on its registered title as prima facie evidence of his interest in the land. The plaintiff did not have to prove that it was an aggrieved person in seeking the removal of the caveat. The onus of proof was on the defendant to persuade the court as to why the caveat should remain on the land (see paras 16 & 19).

- A (2) It is settled law that a consent order is like a contract and should be interpreted in accordance with the rules of contractual construction. Like a binding contract, the terms and conditions of the consent order were binding on the plaintiff and the defendant (see paras 21 & 29).
- B (3) There was nothing in the consent order that expressly stated that the 'offer to purchase' must be an unconditional agreement. Moreover, it was usual conveyancing practice that sales and purchase agreements for land and immovable property were subjected to conditions precedent, which both the seller and buyer must fulfill before the agreement could be completed. It would not be possible to imply into the consent order, by custom or practice, the interpretation that the phrase 'offer to purchase' meant an unconditional agreement (see para 33).
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- D (4) Based on the terms of the consent order, the defendant did not have any residual rights and/or interests on the land under the 2013 SPA and the suit. The defendant's right under the consent order was to a refund of the sum of RM2,050,000. Any right granted under the consent order for the defendant to maintain caveat on the land was for a definite period, which ended 14 days after the defendant's receipt of the notice from the plaintiff. The right neither was a right to the title of the land nor was it a right capable of registration on the land. The right was of a pure monetary claims ie a right in personam against the plaintiff and it did not create any interest in the land. The defendant therefore, did not have any caveatable interest in the land (see paras 36 & 38).
- E
- F **[Bahasa Malaysia summary]**
Plaintif dan defendan telah memasuki perjanjian jual beli ('PJB 2013 tersebut') tanah yang terletak di Bukit Nanas, Kuala Lumpur. Pertikaian berbangkit di antara pihak-pihak berkaitan PJB 2013 tersebut dan akibatnya, defendan memasuki kaveat ke atas tanah tersebut. Defendan kemudiannya memulakan tindakan terhadap plaintiff ('tindakan tersebut') dan kemudiannya mereka memasuki perintah izin berkaitan kepada tindakan tersebut. Pada 20 Disember 2016, plaintiff memasuki perjanjian jual beli ('PJB') dengan pihak ketiga di mana plaintiff bersetuju untuk menjual dan pembeli bersetuju untuk membeli tanah tersebut untuk harga belian sejumlah RM29 juta. Peguam plaintiff telah memberitahu defendan mengenai PJB tersebut ('notis') dan memohon bahawa defendan menarik balik kaveat mengikut klausa 2(g) perintah izin tetapi defendan enggan menarik balik kaveat tersebut. Plaintiff kemudiannya memfailkan permohonan ini ('lampiran 1') di bawah s 327 Kanun Tanah Negara untuk pemotongan kaveat yang dimasukkan oleh defendan ke atas tanah tersebut. Plaintiff berhujah bahawa kaveat patut dipotong kerana defendan tidak mempunyai apa-apa kepentingan berdaftar dan/atau kepentingan yang boleh dikaveat dalam tanah tersebut; dan tidak terdapat soalan serius yang mewajarkan perbicaraan. Bertentangan kepada penghujahan plaintiff, defendan berhujah bahawa PJB tidak mematuhi
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terma-terma perintah izin dan bahawa perintah izin memberikannya hak untuk mengekalkan kaveat ke atas tanah tersebut. Defendan selanjutnya berhujah bahawa dia mempunyai kepentingan yang boleh dikaveatkan ke atas tanah tersebut, di mana kepentingan berasal daripada PJB 2013 tersebut.

Diputuskan, membenarkan perintah seperti dikehendaki terhadap lampiran 1 dengan kos sebanyak RM15,000 tertakluk kepada alukator:

- (1) Undang-undang atas pemotongan kaveat adalah jelas dibuktikan. Plaintif sebagai pemilik tanah berdaftar boleh bergantung ke atas hakmilik yang didaftarkan sebagai keterangan prima facie terhadap kepentingannya dalam tanah tersebut. Plaintif tidak perlu untuk membuktikan bahawa ia adalah pihak yang tidak berpuas hati di dalam memohon pemotongan kaveat tersebut. Beban pembuktian adalah ke atas defendan untuk memujuk mahkamah mengapa kaveat patut kekal ke atas tanah tersebut (lihat perenggan 16 & 19).
- (2) Ia adalah undang-undang nyata bahawa perintah izin adalah seperti kontrak dan patut ditafsirkan mengikut peraturan-peraturan pembinaan kontraktual. Seperti kontrak yang mengikat, terma-terma dan syarat-syarat perintah izin adalah mengikat ke atas plaintif dan defendan
- (3) Tidak terdapat apa-apa di dalam perintah izin yang dinyatakan dengan jelas bahawa 'offer to purchase' mestilah perjanjian tanpa syarat. Lebih lagi, ia adalah amalan pemindahhakkan biasa bahawa perjanjian jual beli bagi tanah dan hartanah tidak boleh dialih adalah tertakluk kepada prasyarat, yang mana kedua-dua penjual dan pembeli mesti patuhi sebelum perjanjian boleh diselesaikan. Ia adalah tidak mungkin untuk menyiratkan ke dalam perintah izin, melalui adat atau amalan, tafsiran bahawa frasa 'offer to purchase' bermaksud perjanjian tanpa syarat
- (4) Berdasarkan terma-terma perintah izin, defendan tidak mempunyai apa-apa hak baki dan/atau kepentingan ke atas tanah di bawah PJB 2013 dan tindakan tersebut. Hak defendan di bawah perintah izin adalah untuk memulangkan jumlah wang sebanyak RM2,050,000. Apa-apa hak yang diberikan di bawah perintah izin bagi defendan untuk mengekalkan kaveat ke atas tanah adalah untuk tempoh yang pasti, yang mana tamat 14 hari selepas defendan menerima notis daripada plaintif. Hak tersebut bukan hak kepada hakmilik tanah ataupun ia adalah hak yang membolehkan pendaftaran ke atas tanah tersebut. Hak adalah tuntutan wang tulen iaitu hak *in personam* terhadap plaintif dan ia tidak membentuk apa-apa kepentingan dalam tanah tersebut. Defendan oleh itu, tidak mempunyai apa-apa kepentingan yang boleh dikaveatkan dalam tanah tersebut (lihat perenggan 36 & 38).]

A Notes

For cases on removal, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 2771–2774.

Cases referred to

- B** *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, PC (refd)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263, SC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (consd)
- C** *MBF Holdings Berhad & Anor v Loy Teik Ngan & Anor and other appeals* [2014] MLJU 1879; [2014] 1 LNS 1746, CA (refd)
Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors [2008] 6 MLJ 839, HC (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)
- D** *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475, FC (folld)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113, FC (refd)

E Legislation referred to

National Land Code ss 323(1), 327, 327(1), Form 19B

HK Niak (Nabila Kamaruddin with him) (Christopher & Lee Ong) for the plaintiff.

- F** *Gan Khong Aik (Lim Bee San with him) (Gan Partnership) for the defendant.*

Faizah Jamaludin JC:

APPLICATION

- G** [1] This is the plaintiff's application by way of an originating summons (encl 1) under s 327 of the National Land Code ('the Code') for the removal of a private caveat Presentation No 5044/2014 ('caveat') entered by defendant on the land held under title No GM 1055, Lot 1478, Bukit Nanas, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan measuring in area approximately 2.05 acres ('land').
- H**

FACTS

- I** [2] The plaintiff is the registered owner of the land.
- [3] The plaintiff and the defendant had entered into a sales and purchase agreement dated 26 December 2013 ('the 2013 SPA'). A dispute arose between them in relation to the 2013 SPA. On or around 31 December 2014, the

defendant entered the caveat on the land: his reason being to protect his interest as a purchaser of the land pursuant to the 2013 SPA. The relevant excerpt of the defendant's entry in the *Application for Entry of Private Caveat* form (Form 19B) is as below:

... berkenaan dengan suatu jualbeli di antara Penjual dengan saya melalui satu Perjanjian Jual Beli bertarikh 26.12.2013 dan terdapatnya pertikaian berkenaan dengan tempoh masa untuk membayar harga jualan dan bagi menjaga kepentingan saya ke atas Hartanah tersebut sebagai pembeli berkenaan dengan jual beli tersebut dan juga sementara pelupusan pertikaian di antara pihak-pihak berkenaan dengan jual beli Hartanah tersebut maka saya masukkan kaveat persendirian ini.

[4] The defendant then commenced legal proceedings against the plaintiff in this court vide Suit No 22NCVC-445-08 of 2015 ('suit'). The parties entered into a consent order dated 13 April 2016 ('consent order') in respect of the suit. The terms of the consent order are as below:

1. That this Consent Order herein shall constitute a full and final settlement of all claims by the Plaintiff against the Defendant and of all counterclaims by the Defendant against the Plaintiff. Plaintiff in Suit No. 22NCVC-445-08/2015 ('Suit') is the Defendant in this Originating Summons No WA-24NCVC-203-02/2017 ('OS') and the Defendant in the Suit is the Plaintiff in this OS.

2. It is hereby agreed by the parties as follows:

- (a) that the Plaintiff shall withdraw this action against the Defendant without liberty to file afresh and without order as to costs;
- (b) that the Defendant shall withdraw the counterclaim in this action against the Plaintiff without liberty to file afresh and without order as to costs;
- (c) the Defendant shall within twenty-four (24) months from the date of this Consent Order ('the Period'), sell and complete the sale of the land held under title No GM 1055, Lot 1478, Bukit Nanas, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the Land') for the purchase price of Ringgit Malaysia Twenty Five Million and Five Hundred Thousand (RM25,500,000.00) or above and in the event of such sale, the Defendant undertakes to refund the sum of Ringgit Malaysia Two Million and Fifty Thousand (RM2,050,000.00) to the Plaintiff within fourteen (14) days from the date of completion of such sale;
- (d) subject to paragraphs 2(e) and 2(f) below, if the Land is unable to be sold for the purchase price of RM25,500,000.00 or above within the Period, the sum of RM2,050,000.00 shall be forfeited by the Defendant upon the expiration of the Period;
- (e) in the event the sale of the Land is unable to be completed due to the default of any buyer, half of any such of deposit forfeited by the Defendant from any of such uncompleted sale shall be paid to the Plaintiff subject to the maximum sum of RM2,050,000.00 within fourteen (14) days from the expiration of the Period;

- A** (f) in the event that there is offer of RM25,500,000.00 or above for the purchase of the Land procured by either the Plaintiff or the Defendant within the Period and the Defendant unreasonably withheld their agreement to sell and/or unreasonably refuse to complete the sale of the Land to such buyer, the Defendant shall refund the sum of
- B** RM2,050,000.00 to the Plaintiff within fourteen (14) days after the expiration of the Period;
- (g) the Plaintiff undertakes to withdraw the private caveat lodged vide presentation No 5044/2014 on the land within fourteen (14) days upon receipt of written notice from the Defendant that there is proof of acceptance of an offer of purchase of the Land; and
- C** (h) parties are at liberty to apply.

D [5] On 20 December 2016, the plaintiff entered into a sales and purchase agreement dated with a third-party buyer, Kemilau Idaman Sdn Bhd ('SPA'), whereby the plaintiff agreed to sell and the buyer agreed to buy the land for a purchase price of RM29m. The SPA is subject to conditions precedent, including, among others The plaintiff is referred to as vendor and Kemilau Idaman Sdn Bhd as purchaser in the SPA:

E ARTICLE II — CONDITIONAL [sic] PRECEDENTS & WITHDRAWAL OF CAVEAT

F 2.0 This Agreement is expressly conditional upon the Purchaser to obtain and receipt [sic] within fifteen (15) months from the hereof (hereinafter referred to as 'the Development Approval Period') the following development approvals from the relevant authority for the Proposed Development (collectively referred to as 'the Development Approval'):-

...

G PROVIDED ALWAYS that the Purchaser may in its absolute discretion waive the procurement of any of the abovesaid Development Approval.

H 2.2 The Vendor shall at its own cost and expense within two (2) months from the date of this Agreement furnish evidence of withdrawal of Caveat to the Purchaser's Solicitors at which time the Vendor's Solicitors may release the Initial Payment to the Vendor. In the event the Caveat is not withdrawn within the said two (2) months, the Development Approval Period shall automatically be extended by the number of days of delay.

...

I 2.4 This Agreement shall be unconditional upon the Purchaser obtained [sic] the Development Approval and the Caveat has been withdrawn (hereinafter referred to as 'the Unconditional Date').

[6] The plaintiff's solicitors in a letter dated 22 December 2016, notified the defendant of the SPA ('notice') and requested that the defendant withdraw the caveat within 14 days of the notice, in accordance with cl 2(g) of the consent order.

A

[7] The defendant, through his solicitors' letter dated 6 January 2017, replied that he refuses to withdraw the caveat. The defendant's solicitors stated in the letter, as follows:

B

2. Kindly be informed upon perusing the Sale and Purchase Agreement between your client and Kemilau Idaman Sdn Bhd ('SPA'), it is our client's contention that the offer and acceptance of the sale of the subject matter land based on the terms of the SPA are both conditional, particularly in reference to the conditions [sic] precedence as set out in Article II of the SPA. Therefore, it is not an absolute and complete offer and acceptance as envisaged under Clause (g) of the Consent Order dated 13.4.2016.

C

3. Notwithstanding the above, our client shall undertake to remove the private caveat lodged vide presentation No 5044/2014 upon the SPA becomes [sic] unconditional save for our client's private caveat and your client's agreement to pay RM2,050,000-00 to our client with 14 days upon receipt of the balance of the purchase price from Kemilau Idaman Sdn Bhd.

D

E

[8] The plaintiff's solicitors, in a letter dated 10 January 2017, informed the defendant that his refusal to remove the caveat is in contravention of cl 2(g) of the consent order and prevents the plaintiff from satisfying the conditions precedents in the SPA. The plaintiff in the said letter also notified the defendant that it will commence legal proceedings against the defendant. The defendant in his reply (through his solicitors' letter of 12 January 2017), maintained his refusal to withdraw the caveat and to date has not withdrawn the caveat.

F

G

THE PLAINTIFF'S CASE

[9] It is the plaintiff's case that the caveat ought to be removed because:

- (a) the defendant does not have any registrable interest and/or caveatable interest in the land; and
- (b) there is no serious question meriting trial.

H

THE DEFENDANT'S CASE

I

[10] The defendant contends that the SPA between the plaintiff and the third-party buyer does not conform to the terms of the consent order. For this reason, the defendant argues that the consent order accords him the right to

A maintain the caveat on the land. He also argues that he has a caveatable interest on the land, which interest originated from SPA 2013 between the plaintiff and defendant.

B [11] The defendant's case is that:

- (a) the consent order acts as a contract between the plaintiff and the defendant;
- (b) the consent order allows the caveat to remain on the land;
- C** (c) the defendant is only obliged to withdraw the caveat upon occurrence of the circumstances stipulated in the consent order; and
- (d) the parties have mutually agreed pursuant to the consent order that the caveat shall remain on the land until and unless there is proof of acceptance of 'an offer of purchase of the land'.

D

[12] The defendant submits that by allowing the buyer 15 months to obtain the relevant approvals:

- E** (a) the plaintiff has deprived the defendant from obtaining the refund of RM2,050,000 as provided under para 2(c) of the consent order;
- (b) constitutes an unreasonable refusal to complete the sale of the land to the buyer within the period 'falling under the intention and meaning of para 2(f) of the consent order';
- F** (c) deprived the defendant the use of the period allowed under the consent order to procure potential purchasers to purchase and complete the sale and purchase of the land within the period in the event that the SPA 'did not go through'; and
- G** (d) deprived the defendant the right to the refund of half of the deposit forfeited by the plaintiff in para 2(e) of the consent order, in the event the buyer failed 'to complete the purchase of the land'.

H [13] In para 18 of his written submissions, the defendant stated that:

The Plaintiff failed to have reasonable regards to the interest of the Defendant at all under the Consent Order looking at its action in agreeing to the terms and conditions of the New SPA. The Defendant refers to the SPA between the Plaintiff and Kemilau Idaman Sdn Bhd as the 'New SPA' to distinguish it from 'SPA' which is the abbreviation used by the Defendant to refer to the 2013 SPA.

I

[14] The defendant submitted that he had filed a suit in this court (WA-22NCVC-165-03 of 2017) ('new suit') for determination of the plaintiff's alleged breach of the terms of the consent order, amongst others, relating to the SPA. He argues that there are triable issues, which are to be tried

in the new suit and the balance of convenience lies with the defendant for the caveat to be maintained pending the determination of the triable issues in the new suit.

A

LAW

B

[15] Under s 327 of the Code, any person who is aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal. Section 327(1) of the Code states:

327 Removal of private caveat by the Court

C

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

D

[16] The law on removal of private caveat is well established. The plaintiff as the registered owner of the land can rely on its registered title as prima facie evidence of his interest in the land. The plaintiff does not have to prove that it is an aggrieved person in seeking the removal of the caveat.

E

[17] The Privy Council held in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 held that where the applicant for the removal of caveat under s 327 is the caveatee (ie the registered proprietor of the land), the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases. It is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so.

F

[18] The Federal Court in *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 held that when the registered proprietor applies for the removal of a private caveat under s 327, the onus of proof is on the caveator and it is for the caveator to satisfy the court that it is just for the caveat to remain; the burden is on the caveator to satisfy the court that he had good grounds for his alleged claim that he has a registrable interest in the land.

G

H

Onus of proof on defendant for a private caveat to remain on land

[19] The onus of proof is on the defendant to persuade this court as to why the Caveat should remain on the land: per the decisions of the Federal Court in *Nanyang Development*, the Supreme Court in *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 and the Privy Council in *Eng Mee Yong*.

I

A [20] The Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 had set-out the three stages through which a caveator must pass in order to sustain his caveat. The principles in *Luggage Distributors* as applied to this present case require the defendant to prove three following matters:

- B First : whether the defendant, in the application for entry of private caveat (Form 19B), had disclosed a caveatable interest;
- Second : if it has disclosed a caveatable interest, whether the evidence he produced before this court in support of his claim to the caveatable interest, discloses a serious issue to be tried; and
- C Third : if the first and second questions are resolved in the defendant's favour, whether on the balance of convenience, lies in favour of the caveat remaining on the register pending the disposal of the defendant's suit.

D *Is a consent order similar to a contract and should be interpreted according to the same rules of construction?*

E [21] It is settled law that a consent order is similar in nature to a contract. The Court of Appeal in *MBF Holdings Berhad & Anor v Loy Teik Ngan & Anor and other appeals* [2014] MLJU 1879; [2014] 1 LNS 1746 (adopting the decision of the High Court in *Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors* [2008] 6 MLJ 839) held that:

F It is settled law that a consent order was by nature similar to a contract between the parties to the suit or binding in respect of matters adumbrated in such a consent order. *The usual rules for construing a commercial contract would accordingly be relevant in the construction of a consent order.* (Emphasis added.)

G [22] Ramly Ali J (as he then was) in *Malaysia Discounts Bhd* at p 854 held that:

H It is trite law that a consent judgment is to be interpreted in the same way as a contract. Thus, the usual principles of contractual construction apply in the instant case: the paramount consideration is to ascertain the intention of the parties to the consent judgment. *Such intention is objectively assessed by the court, in particular by reviewing the language employed in the consent judgment.* (Emphasis added.)

I *Does an agreement between the owner of the land and a caveator, accord the caveator a caveatable interest in the land?*

[23] One of the questions of law before the Federal Court in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475 was 'whether a person must demonstrate that he comes within s 323(1) of the Code to entitle him to lodge/maintain a private caveat on land, notwithstanding the existence

of an agreement which allow him to enter such private caveat?'. See [2012] 6 MLJ at pp 479–480, para [1].

[24] In *Score Options*, the appellant who was the registered proprietor of the land in question, had entered in a joint venture cum project management agreement with the respondent ('JVPM agreement'). Under cl 6.1 of the JVPM agreement, the respondent was given the right to enter a private caveat on the project land. Pursuant to the JVPM agreement, the appellant also executed two powers of attorney in favour of the respondent, giving the respondent rights in respect of the development project.

[25] The Federal Court held that the rights conferred by the appellant to the respondent under the JVPM agreement and the powers of attorney were merely rights to develop the land that would give rise only to a monetary interest ie a right in personam against the appellant and does not create any interest in the land. Arifin Zakaria CJ in delivering the judgment of the Federal Court held that at [2012] 6 MLJ p 488 at para 38:

Under the NLC, these rights are not capable of registration. They do not fall under any scheme of dealings in alienated lands as provided under Division IV of the NLC.

[26] The Federal Court held that for an interest to be caveatable, the interest must be an interest in the land which is capable of registration. Arifin Zakaria CJ at pp 487–488 said that:

[35] It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.

[36] Emphasis should be given to the words 'registrable interest' in s 323(1)(a) of the NLC. *To be caveatable, the interest must be interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.* (Emphasis added.)

[27] In *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113, the appellant claimed that a deed of assignment gave him a right to lodge a private caveat when the purchase price was not fully paid. The Federal Court held that the contractual right in the deed of assignment alone cannot create a caveatable interest in land. Hashim Yeop Sani FJ in delivering the judgment of the Federal Court held that [1984] 2 MLJ at p 116:

The contractual provision does not create an interest within the meaning of s 323 of the National Land Code. Interests which are protectable by caveat are only interests

- A *recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat.* Section 323(1) of the National Land Code sets out the classes of persons who may lodge a private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title or interest; and includes person or
- B body claiming to be beneficially entitled under any trust affecting any such land or interest. *The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land.* (Emphasis added.)

C ANALYSIS

- [28] It is settled law that in an action for removal of caveat under s 327 of the Code, the onus of proof is on the caveator that he has a caveatable interest on
- D the land.

- [29] As discussed in paras [21] and [22] above, it is also settled law that a consent order is like a contract and should be interpreted in accordance with the rules of contractual construction. Like a contract, the terms and conditions of the consent order are binding on the plaintiff and the defendant. Per the
- E decision of Ramly Ali J (as he then was) in *Malaysia Discounts Bhd*, it is for this court to objectively assess the intention of the parties by reviewing the language used in the consent order.

- [30] Pursuant to cl 2(c) of the consent order, the plaintiff must sell and complete the sale of the land within 24 months from the date of the consent order ie by 12 April 2018 ('the period') for a purchase price of RM25,500,000 or more. On the completion of the sale, the plaintiff undertakes to refund the
- F defendant the sum of RM2,050,000 within 14 days from the date of completion.
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- [31] The defendant undertook in cl 2(g) of the consent order to withdraw the caveat within 14 days upon receipt of written notice from the plaintiff that there is proof of acceptance of an offer of purchase of the land (referred to in
- H this judgment as 'notice').

- [32] Notwithstanding his undertaking, the defendant refuses to withdraw the caveat from the land after receiving the notice. He argues, as set-out in para 14 of the defendant's written submission that in order the phrase 'an offer of
- I purchase of the Land' to fall within the ambit of in para 2(g) of the consent order and to fit the intention of the parties to the consent order, the offer to purchase must be an unconditional agreement; be for the price of RM25,500,000 and above; and be completed (ie payment received) within 24 months from the date of the consent order ie by 12 April 2018.

[33] On my objective reading of the language in the consent order, I find that there is nothing in the consent order that expressly states that the 'offer to purchase' must be an unconditional agreement. Moreover, it is usual conveyancing practice that sales and purchase agreements for land and immovable property are subject to conditions precedent, which both the seller and buyer must fulfil before the agreement can be completed. Accordingly, I also find that it would not be possible to imply into the consent order, by custom or practice, the interpretation that the phrase 'offer to purchase' means an unconditional agreement.

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[34] For these reasons, I disagree with the defendant's contention that the phrase 'offer to purchase' in the consent order means an unconditional agreement. Furthermore, on the ordinary contractual interpretation of the language used in the consent order, I find that the defendant's undertaking in cl 2(g) is a stand-alone undertaking and is not subject to the terms of cl 2(c).

C

D

[35] The defendant has submitted further and/or in the alternative that he has a caveatable interest on the land pursuant to the consent order. The defendant argues that his 'rights and interest to maintain the caveat on the land has been transformed and captured under the consent order, and this is a right as agreed by both parties with the recording of the consent order' para 23 of the defendant's written submissions.

E

[36] In my view, based on the terms of the consent order, the defendant does not have any residual rights and/or interests on the land under the 2013 SPA and the Suit. Paragraph 1 of the consent order expressly states that the consent order constitutes a full and final settlement of all claims by the defendant against the plaintiff and all counterclaims by the plaintiff against the defendant. The parties also agreed for the defendant to withdraw the suit against the defendant without liberty to file afresh and without order as to costs para 2(a) of the consent order.

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[37] The consent order expressly stipulates that the defendant is to withdraw the caveat within 14 days of receiving the notice from the plaintiff.

H

[38] The defendant's right under the consent order is to a refund of the sum of RM2,050,000 or up to the maximum sum of RM2,050,000 depending on the permutations detailed in consent order. Any right granted under the consent order for the defendant to maintain the caveat on the land is for a definite period, which ends 14 days after the defendant's receipt of the notice from the plaintiff. Applying the decision in *Score Options*, the right neither is a right to the title of the land nor is it a right capable of registration on the land. The right is of a pure monetary claim ie a right in personam against the plaintiff and it does not create any interest in the land. The defendant, therefore, does

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A not have any caveatable interest in the land.

DECISION

B [39] For the reasons stated above, I find that the defendant has failed to prove to this court that he has a caveatable interest in the land.

C [40] Having found that the defendant has no caveatable interest in the land, it is not necessary for me to consider the other two stages of the enquiry set out in *Luggage Distributors* ie the questions on whether there is a serious issue to be tried and whether on a balance of convenience the caveat should remain.

[41] I also find that the defendant has failed to comply with the consent order by refusing to withdraw the caveat within 14 days of receiving the notice.

D [42] Accordingly, I allow order in terms of the prayers sought by the plaintiff in encl 1 with costs prayed in prayer (c) of RM15,000 to be paid by the defendant to the plaintiff by or before 5 June 2017 (subject to the payment of the allocatur fee of 4% of the costs) with interest of 5% to be calculated from 6 June 2017 until full payment of the costs by the defendant to the plaintiff.

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ORDER

[43] So ordered accordingly

F *Order in terms of encl 1 allowed with costs of RM15,000 subject to allocator.*

Reported by Dzulkarnain Ab Fatar

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